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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Brief For National Live Stock Producers Association, Amicus Curiae.

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Preliminary Statement.

This Brief is filed pursuant to the consent of the parties hereto and in support of the decision of the United States Court of Appeals for the Tenth District, reported in 241 F. (2d) 192.

Statement of Interest

Your Amicus Curiae, the National Live Stock Producers Association, is a not-for-profit organization composed of 23 cooperative livestock marketing agencies having offices in 33 states and marketing the livestock of their individual producer members, the latter group totaling 557,000. The marketing activities of these organizations occur in the principal stockyards and other points throughout the United States. Substantially similar regulations to that which is herein involved have been proposed at other stockyards in this country. The enforcement of these will cause irreparable financial hardship and loss to the livestock producers by greatly impairing the effectiveness and efficiency of their cooperative marketing agencies. As a result, your present Amicus Curiae desires to make its position known to this court in an attempt to forestall the dire consequences which would result from a successful enforcement of the regulation challenged in these proceedings.

The following is a list of the membership of the National Live Stock Producers Association, together with their individual locations:

Member	Location
California Farm Bureau Mktg. Assn.	Visalia, California
Chicago Producers Commission Assn.	Chicago, Illinois
Cincinnati Live Stock Producers Assn.	Cincinnati, Ohio
Equity Co-op. Livestock Sales Assn.	Milwaukee, Wisconsin
Evansville Producers Commission Assn.	Evansville, Indiana

Michigan Live Stock Exchange	Detroit, Michigan
Mississippi Livestock Producers Assn.	Jackson, Mississippi
Oklahoma Livestock Marketing Assn.	Oklahoma City, Oklahoma
Peoria Producers Commission Assn.	Peoria, Illinois
Producers Co-operative Commission Assn.	Buffalo, New York
Producers Livestock Association	Columbus, Ohio
Producers Marketing Association, Inc.	Indianapolis, Indiana
Producers & Texas Livestock Mktg. Assn.	Kansas City, Missouri
Producers Livestock Marketing Assn.	Louisville, Kentucky
Producers Live Stock Marketing Assn.	National Stock Yards, Illinois
Producers Livestock Marketing Assn.	Salt Lake City, Utah
Producers Live Stock Marketing Assn.	Omaha, Nebraska
Producers Commission Association	Sioux City, Iowa
Producers Live Stock Commission Co.	Springfield, Illinois
Producers Livestock Marketing Assn.	South St. Joseph, Missouri
Tennessee Producers Livestock Mktg. Assn.	Nashville, Tennessee
Texas Livestock Marketing Association	Fort Worth, Texas
Valley Livestock Marketing Assn.	Stockton, California

STATEMENT OF THE CASE.

The Denver Union Stock Yard Company promulgated the following regulation designated as 10(c):

> "(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard property, or elsewhere, nor shall any other person upon Stock Yard Company property—
>
> "(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> "(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or
>
> "(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.
>
> "The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:
>
> The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.
>
> "The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

Proceedings were instituted before the Secretary of Agriculture by the Respondent to expunge this particular regulation from the Stockyard's Tariff. It was urged in those proceedings that this section was unlawful as a matter of law. The Secretary, however, took the position that such was not the case, and a hearing was necessary including the submission of evidence in order for him to ascertain the validity or invalidity of the regulation. Accordingly, the complaint was dismissed. The Respondent then appealed to the Circuit Court of Appeals for the Tenth Circuit and that tribunal found the regulation invalid upon its face and remanded the proceedings back to the Secretary with instructions to " * * * vacate the order dismissing Petitioner's complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its regulation 10(c)." This case is here on appeal from that decision.

The exact procedural steps are set out in detail in the briefs of the principal parties herein and, therefore, there will be no attempt to restate them in this document.

SUMMARY OF THE ARGUMENT.

This Amicus Curiae is of the considered opinion that the regulation in controversy is invalid on its face as a matter of law. Therefore, the decision of the Secretary of Agriculture was erroneous and that of the lower court in these proceedings was correct and should be affirmed by this court. The arguments sustaining this position can readily be summarized.

The regulation which the Denver Union Stock Yard Company sought to enforce is diametrically opposed to the objectives of the Packers and Stockyards Act. Further, it violates the basic precept of public utility law that exclusive patronage cannot be demanded as a condition precedent to the furnishing of utility services. As a result, it is invalid as a matter of law, and it was unnecessary for the Secretary of Agriculture or any of his subordinates to hear evidence in order to arrive at this determination.

In answer to the arguments of the opposition contained in their briefs, it will be demonstrated that the hearing had at the administrative stages of this proceeding was in full compliance with the requirements of the Packers and Stockyards Act, and in arriving at its decision the lower court did not usurp any authority granted by that statute to the Secretary of Agriculture.

ARGUMENT.

I.

The Challenged Regulation is Diametrically Opposed to the Objectives of the Packers and Stockyards Act and is, therefore, Unlawful.

A stockyard, in transacting business, must naturally engage in many types of activities and furnish those who deal with it a variety of services and facilities. In order to accomplish these manifold tasks it is necessary for it to adopt regulations and rules of practice and procedure governing not only its own conduct but that of those granted access to its property, facilities and services. This right to regulate the conduct of third parties is not, however, without a degree of restraint. The basis of such restriction is found in the Packers and Stockyards Act, Section 208:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U.S.C. (1952) Section 208.

The very terms of the statute limit the power of those regulated thereby to promulgate rules and practices for themselves and others. If those created are unjust, unreasonable or discriminatory, they automatically become unlawful and invalid.

It is irrefutable that a regulation operating directly contra to the objectives of the present statute would be considered unreasonable, unjust or discriminatory. Any other conclusion would render the Packers and Stockyards Act ineffective since rules or regulations of those governed thereby could circumvent its basic tenets. It is the position of this Amicus Curiae that the basic objectives of the Packers and Stockyards Act are violated by regulation 10(c) contained in the Tariff of the Denver Union Stock Yard Company.

The courts of this country have, at various times, enunciated the objectives sought to be accomplished through this statute. The first of these is to eliminate discriminatory and unfair practices. This policy has been adequately described in the following decisions:

> *United States* v. *O'Rourke,* 116 F. Supp. 857 (1953): "The purpose of this Act is to insure without discrimination reasonable stockyards' service * * * reasonable and non-discriminatory rates * * * and the elimination of unjust or discriminatory practices."
>
> *Houfburg* v. *Kansas City Stockyard Company of Maine, Mo.,* 283 S. W. (2d) 539 (1955): "The Packers and Stockyards Act was enacted to remedy abuses that have grown up in the large stockyards of the country in that packers, stockyards, owners, commissionmen and dealers were engaged in unfair, monopolistic and discriminatory practices."

The exclusive patronage requirement of 10(c) actually breeds discrimination. It creates preferences between those who can and will transact all their business in the area through the stockyards and those who cannot or are unwilling to eliminate their off-the-yards connections. The latter group is absolutely excluded from the yards' facilities. It is important to notice that such preference is by its very terms arbitrary and without reason. It

provides for no exceptions and is applicable whether the result achieved is beneficial or detrimental to the public, the producers, marketing agencies or the stockyard itself. The Act provides that a " * * * discriminatory regulation or practice is prohibited and declared to be unlawful." The regulation under scrutiny reeks of such discrimination and, therefore, the conclusion of the lower court that it is unlawful on its face should be affirmed.

Another aim of the Act is to guarantee free and open competition thus allowing livestock producers to obtain a fair price for their animals. Again, the language of the courts clearly enunciates the presence of this objective.

> *Bowles* v. *Albert Glauser, Inc.*, 61 F. Supp. 428 (1945): "It is the declared public policy of the government to maintain public stockyards * * *. Government supervision of public stockyards has for one of its prime purposes the maintenance of open and free competition of buyers aided by the sellers' representatives. Such a system results in the payment of the highest market price for the producers' product that such arrangement can effect not exceeding, however, the maximum price set by government order."
>
> *United States* v. *Donahue Bros.*, 59 F. (2d) 1019, 8th Circuit, (1932): "One of the purposes of this Act was to protect the owner and shipper of livestock and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, over-reaching manipulation or other unfair practices might not return to him a fair return for his product."

This concept of free and open competition is drastically curtailed by the exclusive patronage doctrine adopted by the challenged regulation. In the proscribed area a market-

ing agency will either utilize the yards' facilities exclusively or not at all. It will be forced to cease transacting business through either the stockyard or its other marketing connections. Thus, the weaker markets in the area will slowly disappear and the stronger ones will develop into monopolies, a trend diametrically opposed to the principle of free and open competition. The regulation being in direct violation with the Packers and Stockyards Act as interpreted by the courts of this country must, of necessity, be declared invalid.

II.

The Challenged Regulation is Discriminatory and Thus is in Contravention of Affirmative Public Utility Law.

The Denver Union Stock Yard Company is a posted stockyard within the scope of the Packers and Stockyards Act. Such yards have, since the enactment of the statute, been accepted and treated by the courts as public utilities; *Stafford* v. *Wallace*, 258 U. S. 494, 42 S. Ct. 397 (1922) and *Midwest Farmers* v. *United States*, 64 F. Supp. 91 (1945). This conclusion has resulted from an interpretation of the various provisions of the Act but basically the following section:

> "It shall be the duty of every stockyard's owner and market agency to furnish upon request without discrimination reasonable stockyards service * * *" 7 U.S.C. (1952) § 205.

Being a public utility it is the duty of a posted stockyard to permit the utilization of its facilities and services without discriminatory or unreasonable requirements. The effect of the foregoing quoted regulation in the Denver Yard's Tariff is to require the Respondent and all in its position to market exclusively through the former's yards

or not at all. Such requirement is unreasonable, discriminatory and violates all basic legal concepts controlling the operation of public utilities.

The question of whether or not a public utility can require exclusive allegiance as a condition to the furnishing of its services has been in issue before the courts and commissions of this country on a number of occasions.

For instance, in the case of *State* v. *Citizen's Tele. Co.*, 61 S.C. 83, 39 S.E. 257 (1901), an individual applied to the defendant utility for its telephone service. His application was refused on the grounds that he also subscribed to the Bell Company's facilities and, therefore, was not eligible for the service he requested. The defendant had adopted a policy of refusing to service those who did not patronize its facilities exclusively. The applicant instituted litigation requesting that the court find the practice invalid and require the company to furnish the requested service. The defendant contended that in the operation of its business it could adopt any rules, regulations or practices it desired. The court, however, ruled for the applicant and stated:

> "It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell telephone system in operation in the same city, but use exclusively respondent's system, than a railroad company to refuse to transport the goods of a shipper unless such shipper would agree to patronize its line exclusively and not to give any of its business to any competing railway line."

In another case, that of *People* v. *Public Service Commission*, 148 N.Y.S. 583 (1914), the Edison Company at-

tempted to enforce exclusive patronage by refusing to install or continue its services to individuals obtaining a portion of their electric power from other utilities. The court in deciding against the exclusive allegiance requirement commented as follows:

> "In our opinion, however, the requirement that a customer obtain all of its electricity from one company or receive none at all is not in any proper sense a regulation respecting the use of the service but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electrical current."

As a principle of law, the concept that a public utility cannot demand exclusive patronage as a condition precedent to the furnishing of services is so well established that even on the utility commission level it is applied without question. Thus, In Re: *Union Electric Light and Power Company, P.U.R.* 1932-B. Page 1, the situation was as follows: The particular utility involved provided its customers with heat and electricity. It refused, however, to furnish the former to anyone who did not subscribe for the latter. This practice was inserted in its schedule, and the commission was required to rule on its validity. That tribunal found that the regulation resulted in discrimination and was, therefore, void.

It is inescapable on the basis of the above decisions that a demand for exclusive allegiance in the public utility field is illegal per se. As the regulation in controversy requires such exclusive allegiance it is in direct violation of this principle and, therefore, invalid.

III.

The "Full Hearing" Requirement of the Packers and Stockyards Act Does Not Necessitate the Admission of Evidence in all Cases.

It will be recalled that the Secretary of Agriculture refused to grant the relief requested in the complaint on the grounds that a hearing would be necessary prior to any determination of the validity or invalidity of the regulation. It was contended that unless evidence was heard, the Secretary would be without a basis for considering the reasonableness or unreasonableness of the exclusive patronage requirement. However, the appeals Court in its opinion held that since the regulation was invalid on its face, the submission of evidence was unnecessary. It is now contended on appeal by several of the opposition that the court erred in finding that the introduction of evidence in the administrative stages of this proceeding was not a necessary requirement. They point out that Section 310 of the Packers and Stockyards Act (7 U.S.C 211) requires that a "full hearing" be given prior to the determination of whether any regulation or practice of a stockyard is unjust, unreasonable or discriminatory. It is next contended that in order to be considered a "full hearing" evidence must be presented during the proceedings, and thus it is concluded that the procedure before the Secretary of Agriculture was insufficient to enable him to do other than dismiss the complaint. Based upon this argument it is urged that the lower court erred in reversing the Secretary's decision.

It is true that the Act contains a "full hearing" requirement, but it is submitted that this requisite was satisfied in the present case. The complaint filed before the

Secretary of Agriculture alleged that the regulation contained in the Denver Union Stock Yard Company's Tariff was unlawful (R. 40). A hearing was had in the administrative stages on that particular issue, to-wit, the legality of regulation 10(c). No evidence was taken in relation thereto and the Respondent refused to submit any, resting its case upon the theory that the rule was void as a matter of law. The arguments in these proceedings were legal in nature and no testimony or other evidence appears in the record. It is obvious, however, from an examination of the law that this type of procedure satisfies the "full hearing" requirement incorporated in the Packers and Stockyards Act.

The famous *Morgan* cases are the sole decisions attempting to establish the elements of a "full hearing" under this particular Act. The first decision in this line of cases, that of *Morgan* v. *United States*, 298 U. S. 468, 80 L. Ed. 1288 (1936), merely concerned itself with the process of arriving at a decision. The second, however, *Morgan* v. *United States*, 304 U. S. 1, 82 L. Ed. 1129 (1938), did attempt to set out a number of procedural requisites necessary to a "full hearing". In describing this type of hearing the court, on page 19, stated:

> "Congress in requiring a 'full hearing' had regard to judicial standards, not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

Thus, it establishes the fact that the elements of a "full hearing" in administrative procedure are those which are ordinarily accepted in our judicial processes and nothing more. Obviously, at a hearing in a court of law where only a question of law is involved, due process would not

require the submission of evidence. To necessitate testimony in such instance would be unrealistic as the only issue before the tribunal is one concerning the law. As was stated above, all parties were given ample opportunity to present their legal arguments before the Secretary and, therefore, it becomes apparent that a "full hearing" was accorded and received.

An additional requisite of a "full hearing" established by the second *Morgan* case is the requirement that all parties must be given "* * * a reasonable opportunity to know the claims of the opposing party and to meet them." (Page 18). Thus, one of the essentials of a "full hearing" is that the parties be apprised of their opposition's contentions and be allowed to contradict them to the fullest extent. The only argument urged during the administrative proceedings in the present case was that regulation 10(c) was invalid as a matter of law. This was known at the outset by the parties concerned, and it is established that oral and written arguments as to its legal validity were offered by both sides. All parties had the opportunity to meet the sole contention manifesting itself in the proceeding, to-wit, that as a matter of law the contested regulation was invalid. As the opposition was apprised of the sole issue involved and given an adequate opportunity to reply, all the essentials of the "full hearing" requirement in the statute as established by the second *Morgan* decision were satisfied.

It is not true, as is insisted in the briefs of several of the parties to this proceeding, that the *Morgan* cases in establishing the scope of a "full hearing" require that the parties present testimony or other evidence. The only requisite set forth in those decisions is that the par-

ties be given an opportunity to submit all of their arguments in the light of the issues presented. The *Morgan* cases involved issues of fact and, as a result, the court, in passing, stated that evidence should be presented. However, the only issue present in the case at hand was a legal one, and that particular aspect was fully argued with all interested parties given full opportunity to submit their views.

Under these circumstances a "full hearing" was had before the Secretary of Agriculture and, as a result, it cannot be argued that this proceeding was not in conformity with the Packers and Stockyards Act.

IV.

The Presentment of Evidence Was Not Necessary to Establish That the Challenged Regulation Was Invalid as a Matter of Law.

The Petitioner also contends that the Secretary of Agriculture's power to issue a cease and desist order in regard to any rule, regulation or practice issued or indulged in by a stockyard depends entirely upon whether such is "unreasonable" within the terms of the Act. It is insisted that the finding of "unreasonable" is always a matter of fact, and since it is an issue of fact it can only be established after the hearing of evidence. Thus, in the present situation as no evidence was submitted by the respondent, the Secretary was justified in dismissing its complaint and the court erred in determining that such dismissal was improper. This contention is untenable. The regulation was attacked merely on the basis that it was illegal on its face, to-wit, that it did not conform to accepted legal principles. No issue of fact was ever raised by the Respondent, and it did not automatically present itself by the mere filing of the complaint. The Secretary

may issue a cease and desist order if a regulation is "* * * unjust, unreasonable or discriminatory". There is nothing in this language necessitating a finding of fact. A regulation can be considered unjust, unreasonable or discriminatory if it violates a principle of law as well as if under a given factual situation it works an unjust, discriminatory or unreasonable consequence.

In its brief the Petitioner devotes many pages to the development of the thesis that the unreasonableness of a regulation or practice depends of necessity on the facts of the situation. This is probably true in many controversies brought before the Secretary. Under these circumstances, evidence would have to be presented for him to become apprised of the situation and develop an opinion as to the merits of either side. However, this does not mean that every situation brought before him will involve a factual question. The only issue upon which the Secretary was requested to rule in the present proceedings was whether as a matter of law the regulation was invalid. In determining this the introduction of evidence was unnecessary. This can be easily demonstrated.

It has been adequately illustrated in the foregoing portions of this brief that the regulation in question not only violates the basic policy underlying the Packers and Stockyards Act but is inconsistent with concepts applicable to public service companies. It is, therefore, invalid on its face and as a matter of law. There was no necessity for a hearing as no fact elicited therein could have legally justified a demand for exclusive patronage. No reason could have been submitted which would permit the sanctioning of this type of regulation. Even if the continued profitable operation of the stockyard depended upon the enforcibility of the exclusive patronage requirement, the latter could not be tolerated.

That there can be no excuse, reason or justification for an exclusive patronage requirement has been concluded by a number of decisions. Typical among these is *Nacogdoches Light & Power Co.* v. *Thomas & Richardson, Tex. Civ.* App. 138 S.W. 1080 (1911), involving a situation wherein the defendant's electricity had been utilized to illuminate the plaintiffs' business premises. The latter, having installed a gas lighting system, desired to retain defendant's facilities on a standby basis. The utility, however, refused to furnish electricity, justifying its action on a company regulation forbidding the furnishing of its services to anyone lighting their premises with gas. The plaintiffs instituted an action to compel the restoration of the electricity, contending that the rule was unreasonable and discriminatory. In opposing this argument the company, among other things, stated that it would have to abandon its business if all of its subscribers were permitted to treat it as a standby service. Despite this financial reason, the company's exclusive patronage rule was stricken, the court reasoning as follows:

> "The effect of such a rule, if enforced, can easily be seen. The tendency would be to drive one or the other system out of business and to give the one remaining a monopoly of the business. If appellant had the right to impose this condition as to the use of gas, it would have equally the right to impose it as to the use of kerosene lamps or candles and thus compel all of its customers to use its lights alone or do without its service entirely. Such a rule or regulation is *on its face unreasonable* and could not be enforced."

If the rule requiring exclusive patronage in the foregoing decision was considered invalid on its face despite compelling financial reasons, the regulation of the Denver Stock Yards must be given the same effect.

A similar argument as to the financial necessity of an exclusive patronage requirement met the same fate in *Strathie* v. *Bucks County Electric Co.*, P.U.R. 1920 D, p 290. There the complainant, a drug store proprietor, had purchased all of his electric power requirements from the defendant. Subsequently, however, the former's landlord installed a small generator, and the complainant proposed to utilize the utility's electricity only when the private source proved inadequate. The defendant electric company, having promulgated a rule requiring its customers to use its service exclusive of all others, refused to furnish any electricity to the complainant on such basis. The sole issue before the Utilities Commission was whether the company's refusal and the regulation on which it was based were valid. The latter contended that it had a right to the profitable as well as the unprofitable business in the community and that its regulation aided in achieving this result. The Commission was not convinced by this argument, and the exclusive patronage requirement was held unreasonable.

This rule against discrimination by way of a demand for exclusive patronage has been maintained even in instances where it is obvious that a utility will either have to abandon certain of its services or possibly face financial ruin. Consider the decision in *Seaton Mountain Electric L, H. & P. Co.* v. *Idaho Spring Inv. Co.*, 49 Colo. 122; 111 P. 834 (1910). The utility furnished electricity and steam heat, the latter being a by-product of the former, to the neighboring community. The plaintiff subscribed to the steam heat service but purchased its electric power elsewhere. Subsequently, those customers utilizing steam heat were notified that unless the company was allowed to furnish them with electric power also, the former service

would be discontinued. The plaintiff thereupon instituted an action seeking to enjoin the utility from terminating this service. The defendant argued that as heat was a by-product of generating electricity, there would be insufficient electricity produced to provide the required amount of heat unless it could demand exclusive patronage, and to produce the latter independent of electricity would be very expensive. Despite this contention, the court found the proposed company rule unreasonable and enjoined its operation. It is obvious from the very facts that the utility could not continue to operate as it had been without the benefit of an exclusive patronage requirement. This factor, however, was immaterial as the company was under a duty to furnish its services without discrimination.

The principle that there can be no justification for a public utility to deny its facilities or services to a patron doing business elsewhere has already been applied by a state court to a stockyard regulated by the Packers and Stockyards Act. The case is that of *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015 (1926) and involved a suit by a stockyard to enjoin an individual from its premises on the ground that the latter was diverting business to other yards, thus causing financial injury to the plaintiff. The court, in deciding on the basis of the pleadings that the yard was not entitled to relief, alluded to the fact that the Packers and Stockyards Act required the furnishing of services and facilities without discrimination and, therefore, the defendant could not be excluded because of outside marketing activities. The important point is that this conclusion was achieved without the admission of evidence and in the face of the allegation that an injury was suffered by the plaintiff due to defendant's off-the-yard marketing. The court, in effect, found as a matter of law that the defendant's outside

marketing activities did not justify his exclusion despite the injury caused plaintiff.

The foregoing decisions aptly demonstrate the fact that an exclusive patronage requirement in the public utility field will not be tolerated regardless of the situation. There are no exceptions or modifications of this rule depending upon the facts of each and every case. This being true, a rule, regulation or demand of this character is invalid on its face and no facts submitted or arguments propounded could justify it. Under these circumstances it becomes obvious that a hearing before the Secretary at which time evidence would have been submitted was unnecessary.

V.

The Circuit Court of Appeals Did Not Deprive the Secretary of Agriculture of His Primary Jurisdiction in Ruling That the Regulation was Invalid on its Face.

It is argued in the brief of the American Stockyards Association, which appeared as amicus curiae supporting the Secretary of Agriculture's position, that the Circuit Court of Appeals in reviewing the decision usurped the Secretary's power when it determined that the regulation involved was invalid. It urges that this determination was within the primary jurisdiction of the Secretary under the terms of the Act. It is true that at least one Federal court has applied the doctrine of primary jurisdiction to the Packers and Stockyards Act. *Kelly* v. *Union Stockyard and Transit Company*, 190 F. (2d) 860 (1951). This doctrine requires that initially the administrator or administrative tribunal which has been delegated the responsibility for the administration of a statute must be allowed to come to grips with any controversy within the scope of the Act before judicial relief is sought. The doctrine, however,

does not foreclose subsequent judicial review after an administrative determination has been made. This court has on occasions stated that the application of the concept of primary jurisdiction does not deprive a court of its power to subsequently adjudicate. See for instance, *General American Tank Car Corporation* v. *Eldorado Terminal Company*, 308 U.S. 422, 84 L. Ed. 361 (1939). Upon this basis it becomes very obvious that the concept has not in any way been violated in these proceedings.

In the case at bar the issue concerning the validity of the yards regulation was first presented to the Secretary of Agriculture through the filing of a complaint by the Respondent. There was no attempt to circumvent the administrative process. It was only subsequent to the issuance of the Secretary's decision that the respondent appealed for judicial relief. Upon review of the Secretary's conclusions the Circuit Court of Appeals was requested to exercise its legitimate power by finding that the rule involved was invalid according to law. This it did. The issue presented to it was merely a question of law and as has been stated by this court on numerous occasions a reviewing judicial tribunal is always the final arbiter of pure questions of law.

Tagg Brothers and Moorhead v. *United States*, 280 U.S. 420, 74 L. Ed. 524 (1930).

Great Northern Ry. Co. v. *Merchants Elev. Co.*, 259 U.S. 285, 66 L. Ed. 943 (1922).

Under these circumstances it can by no stretch of the imagination be stated that the decision of the Circuit Court of Appeals in this controversy abrogated the doctrine of primary jurisdiction as established by this court in numerous cases.

VI.

The Circuit Court of Appeals Did Not Evade Administrative Authority by Instructing the Secretary of Agriculture to Issue a Cease and Desist Order.

It was argued on behalf of the opposition that even if the Circuit Court of Appeals was correct in determining that the exclusive patronage requirement was invalid, it erred in instructing the Secretary of Agriculture to enter a cease and desist order against the Denver Union Stock Yard Company. The contention is that the court's only authority was to reverse the Secretary's decision and remand the case for further administrative action. It would then be within the discretion of the Secretary to take the appropriate steps. That the court did not, by issuing these instructions, usurp any administrative power becomes patently clear when the situation is logically analyzed. The single issue before the Secretary concerned the validity as a matter of law of the regulation herein involved. The Secretary found that it was not invalid on its face, and the absence of evidence in the record prevented him from determining whether it would have a valid or invalid application. The complaint was then dismissed. Upon appeal, the Circuit Court of Appeals determined that the rule was invalid on its face and entered the order which is now complained of. If the rule is illegal per se, then no further administrative proceeding is necessary. The establishment of facts at a subsequent hearing could not in any way validate the exclusive patronage requirement. The court terminated any possibility of further administrative hearings by finding that the regulation was invalid on its face. The only permitted course open to the Secretary of Agriculture under these

circumstances would be to prevent the Denver Union Stock Yards from enforcing the invalid regulation. The court instructing him to accomplish this has not in any way infringed upon his discretion. He no longer has any discretion in the matter.

CONCLUSION.

On the basis of the foregoing brief, it is respectfully submitted that the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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